Guard Publishing Company d/b/a The Register-Guard *and* Eugene Newspaper Guild, Local 194. Case 36–CA–6101

January 31, 1991

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS DEVANEY AND OVIATT

Upon a charge filed by the Union June 9, 1989, the General Counsel of the National Labor Relations Board issued a complaint and notice of hearing on July 25, 1989, alleging that the Respondent violated Section 8(a)(5) and (1) of the Act by changing wages of unit employees without affording the Union the opportunity to bargain about the changes. The Respondent filed a timely answer admitting in part and denying in part the allegations in the complaint.

On December 11, 1989, the General Counsel, the Union, and the Respondent filed with the Board a stipulation of facts and motion to transfer the case to the Board. The parties stated that the stipulation and the attached exhibits constituted the entire record in this case and that they waived a hearing and decision by an administrative law judge. Thereafter, the Union and the Respondent filed briefs. On April 19, 1990, the Board approved the stipulation and transferred the proceeding to the Board for issuance of a decision and order.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

On the entire record and briefs, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, an Oregon corporation with an office and place of business in Eugene, Oregon, is engaged in the operation of a newspaper. During the 12-month period preceding execution of the stipulation, a representative period, the Respondent, in the course and conduct of its operations, derived gross revenues in excess of $1 million and purchased and received goods and materials valued in excess of $50,000 directly from sources outside the State of Oregon or from within the State from suppliers that in turn, obtained these goods and materials directly from sources outside the State.

We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. *Facts*

The Union and the Respondent have bargained for many years concerning wages, hours, and terms and conditions of employment of employees in the following appropriate unit:

> All editorial, circulation, business office, display and classified advertising, promotion and information services employees; excluding confidential employees, part-time and temporary employees, and supervisors as defined in the Act.

The most recent collective-bargaining agreement was in effect from December 22, 1985, until November 1, 1987. That agreement contained provisions listing minimum scale wages for full-time bargaining unit employees. In addition, article XIII, section 3[1] of the contract reads as follows:

> Section 3. In the sole discretion of the Publisher, wages in excess of the minimum wage may be paid. Employees paid merit increments above the minimum wage shall retain those increments when minimums are increased.
>
> However, this provision is not intended to prevent the reduction of merit pay should an employee's performance become unsatisfactory. In that event, the employee shall be notified of the problem and given an appropriate length of time to correct it before merit pay is reduced.

The Respondent has unilaterally granted wages above contractual minimum scale in the past based on economic considerations. For example, the Respondent has placed a new hire on the wage scale above the wage corresponding to his level of experience and has often maintained employees who had been transferred to lower-paying classifications at their previous wage levels, paying fixed and/or percentage amounts over contractual scale wages corresponding to experience in the new positions.

Negotiations for a new contract began September 1987 and continued until July 1988. During negotiations, neither party proposed any revisions to article XIII, section 3. In July 1988, the Respondent declared impasse and implemented its final offer. In a separate proceeding, the Union filed 8(a)(5) charges with the Board alleging that the Respondent has refused to bargain in good faith. The General Counsel declined to issue a complaint in that case, finding that the parties were at impasse.

At the point of impasse and throughout negotiations, the wage scale of article XII of the 1985–1987 collective-bargaining agreement was a point of contention.

[1] The first clause of art. XIII, sec. 3 has been part of every collective-bargaining agreement between the parties for more than the past 20 years.

Initially, the Union proposed across-the-board increases for all wage classifications and extraordinary increases for several classifications, such as newspaper layout clerk. Before impasse was reached, the Union dropped its extraordinary increase proposal and proposed an across-the-board increase for all unit members. The Union's across-the-board proposal was part of an overall proposal that included other cost items. Although the Respondent did not implement other elements of the Union's overall proposal, it implemented the Union's wage scale, which contained a smaller across-the-board increase than that originally proposed by the Union—1 percent scheduled November 6, 1988, and again May 7, 1989, and no extraordinary increases.

In April 1989, while impasse continued, the Respondent decided to implement additional upward adjustments in wage scales of 12 clerical job classifications affecting about 28 of the Respondent's approximately 140 unit employees.[2] The adjustments were scheduled to run concurrently with the May 7 scheduled increase. The increases were not ''merit increases,'' as the parties define that term, but were adjustments based on an informal survey of seven local employers conducted by the Respondent's personnel director. On April 24, 1989, the Respondent informed the Union's president of its decision to implement these wage scale adjustments and presented the decision as final. The same day, the Respondent delivered a memorandum directly to affected employees informing them that they would receive increases in addition to their scheduled May 7 across-the-board increases. No bargaining occurred over the decision to award these increases, which represented the first time the Respondent ever unilaterally increased the wages of an entire classification of employees above contractual scale. On May 16, the Union requested bargaining. The record does not indicate whether the Respondent responded to the Union's request or whether or when the increases actually took effect.

II. CONTENTIONS OF THE PARTIES[3]

The Respondent contends that the wage adjustments are justified under article XIII, section 3 of the expired contract, which reserves for the Respondent the discretion to pay wages in excess of minimum contractual wages. The Respondent argues that the wage scale only sets minimums, not wage ceilings. Further, the parties have placed no qualifications on the broad language of the first clause of article XIII, section 3, in the more than 20 years the clause has been included in the parties' contracts. The Respondent claims the language is clear and unequivocal and that, like the contractual language justifying the grant of attendance incentive bonuses in *Johnson-Bateman Co.*, 295 NLRB 180, 188–190 (1989), the contract clause here is sufficiently specific to warrant a finding that the Union has contractually waived its right to bargain about wage scale adjustments.

The Union argues that article XIII, section 3 does not waive its statutory right to bargain over the wage scale increases. The contractual language, which refers to ''merit increases above the minimum wage,'' emphasizes the individualized nature of authorized adjustments, the Union contends. As to past practice, the Union maintains that the wage scale itself has remained unaltered in both instances of unilateral wage adjustments in which the Respondent has previously invoked article XIII, section 3.

III. DISCUSSION

We find merit to the Union's contention that the Respondent's unilateral adjustment to the contractual wage scale is not authorized by the expired contract. We assume for purposes of analysis, as do the parties, that *any* waiver of bargaining rights contained in article XIII, section 3 survived expiration of the most recent contract containing this provision. That issue is unnecessary for us to address here because we do not find that contractual waiver justifies the Respondent's unilateral action in any event.

A contractual waiver of a statutory right will not be lightly inferred, but rather must be ''clear and unmistakable.'' *Metropolitan Edison v. NLRB*, 460 U.S. 693, 708 (1983). Thus, we will ordinarily not infer a waiver of the right to bargain over a particular mandatory subject of bargaining from a contract clause couched in general terms. *Johnson-Bateman Co.*, supra. See also *Park-Ohio Industries*, 257 NLRB 413, 414 (1981), enfd. 702 F.2d 624 (6th Cir. 1983). Article XIII, section 3 does not contain the requisite specificity for a waiver of the right to bargain over an increase in the wage scale for all employees in a job classification. Although it expressly authorizes the payment of wages in excess of the minimum scale, it does not contain language specifically authorizing unilateral alteration of wage scales for entire job classifications. Indeed, it contains no reference at all to wage scales or to article XII of the expired agreement, where the scales for various job classifications are set forth. The specific language contained in article XIII, section 3 all pertains to merit increases for individuals, a fact that supports the conclusion that the discretion afforded the Respondent relates to increases for particular individuals over the wage-scale minimum for their classification, rather than general wage increases for an entire classi-

[2] These classifications were news aide; editorial assistant; newspaper layout clerk; data processor A; data processor B; PBX/Receptionist; secretarial classifications A, B, and C; and clerk-typist classifications A, B, and C.

[3] Only the Respondent and the Union have filed briefs.

fication of employees.[4] Thus, the language of the bargaining agreement does not itself constitute a waiver under the *Metropolitan Edison* standard.

The Board may also, on the basis of bargaining history and past practice, infer waiver of a statutory right. Evidence of bargaining history, however, must be sufficient to demonstrate that the allegedly waived matter was fully explored in negotiations and that the statutory right at issue was consciously yielded.[5] Here, there is no evidence of bargaining history over any one of the variations of article XIII, section 3 contained in contracts in effect before December 1985, and it is stipulated that during 1987 negotiations neither the Respondent nor the Union proposed any modification to article XIII, section 3. On the other hand, there *is* evidence that the Union sought extraordinary increases during 1987 negotiations in individual job classifications, including at least one whose minimum rates the Respondent later unilaterally altered. The Union dropped its proposal for those extraordinary increases before the parties reached impasse, and the wage proposal that the Respondent implemented on impasse did not contain those increases. In sum, the bargaining history reveals that the Union's only conscious yielding on the subject of wage increases was its withdrawal of its own proposals for substantial increases in a number of job classifications. In no way can this be construed as tacit agreement that the Respondent would be free to increase particular job classification wage scales unilaterally as it saw fit.

As to past practice, the Respondent has unilaterally placed individual new hires and transferees at wage rates higher than those correlating to employee experience. This evidence pertains to wage adjustments for individual employees only, not entire classifications of employees. In fact, the parties have stipulated that before May 1989 the Respondent never unilaterally raised the wages of an entire classification of employees above the contractual wage scale. Thus, waiver cannot be inferred from evidence of past practice. Nor may the Respondent rely on the Union's past failure to request bargaining over individual wage adjustments to justify unilateral action: ''A union's acquiescence in previous unilateral changes does not operate as a waiver of its right to bargain over such changes for all time.'' *Owens-Corning Fiberglas*, 282 NLRB 609 (1987), and cases there cited.

The Respondent's reliance on *NCR Corp*., 271 NLRB 1212 (1984), is misplaced. *NCR* involved a dispute over two collective-bargaining provisions—one governing transfers between districts of the respondent's territory and the other authorizing the employer to consolidate, merge, or reorganize a district. The union interpreted these articles to bar transfer of work from one district to another, while the employer relied on the same provisions as authorization for its unilateral work transfers. In the face of equally plausible interpretations of the contract, the Board stated it would not endorse either party's interpretation as correct, but found the employer's ''sound and arguable basis'' for its unilateral work transfers warranted dismissal of the 8(a)(5) complaint.[6]

In contrast to the contract at issue in *NCR*, article XIII, section 3 contains no language that is sufficiently specific regarding wage-scale adjustment to support a plausible interpretation justifying the Respondent's unilateral action.[7] Even assuming, however, that the term ''wages in excess of minimum'' could be construed to encompass wage rates affecting an entire classification of employees, the analogy to *NCR* still fails. Thus, unlike employer NCR, which offered evidence of past practice consistent with its interpretation of the contract, Respondent relies on past adjustments to wages of individual employees only, rather than of employee classifications. None of this evidence supports the interpretation the Respondent asserts.

Accordingly, we conclude that the Union has not waived its right to bargain with the Respondent over wage-scale adjustments, a mandatory subject of bargaining, and that the Respondent's unilateral decision to increase the wage scales for certain job classifications and notices to employees announcing these increases, without providing the Union with prior notice and an opportunity to bargain, violated Section 8(a)(5) and (1) of the Act.

CONCLUSION OF LAW

By its decision to increase the wage scale for certain job classifications without providing the Union with prior notice and an opportunity to bargain and by announcing these increases to employees, the Respondent has violated Section 8(a)(5) and (1) of the Act.

[4] The distinction we draw between individual increases and across-the-board increases for an entire group of employees was also drawn by the Board in finding no contractual waiver in *C & C Plywood Corp*., 148 NLRB 414, 417 (1964), a finding that was upheld by the Supreme Court in *NLRB v. C & C Plywood*, 385 U.S. 421, 430–431 (1967).

The Board's resolution of the waiver issue concerning the attendance-incentive-bonus plan in *Johnson-Bateman Co*., supra, is not inconsistent with our holding here. The contract clause there was similar in that it allowed the employer to grant employees ''additional pay or benefits'' above the contract minimums; but the particular increases as to which the Board found a waiver of bargaining were increases granted to individual employees on the basis of their respective attendance records and not, as here, changes in the wage scale for an entire job classification.

[5] See *Southern Florida Hotel Assn*., 245 NLRB 561, 567–569 fn. 22 (1979), enfd. in pertinent part 751 F.2d 1571 (11th Cir. 1985); *Johnson-Bateman Co*., supra.

[6] 271 NLRB at 1213.

[7] See *Southern California Edison Co*., 284 NLRB 1205 fn. 1 (1987) (contract clauses invoked by an employer to authorize unilateral temporary work assignments found insufficiently specific to override clear terms of a separately negotiated disability plan).

REMEDY

Having found that the Respondent has engaged in unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Specifically, we shall order the Respondent to bargain with the Union over its wage-scale change proposals. Further, we shall order the Respondent, on the Union's request, to cancel any wage increases unlawfully implemented by the Respondent's unilateral action. Nothing in our Order, however, should be construed as requiring the Respondent to cancel any wage increase without a request from the Union. See *Taft Broadcasting Co*., 264 NLRB 185 fn. 6 (1982).

ORDER

The National Labor Relations Board orders that the Respondent, Guard Publishing Company d/b/a the Register Guard, Eugene, Oregon, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Unilaterally increasing the wage scale for certain job classifications without providing the Union with prior notice and an opportunity to bargain and announcing the increases to employees.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with Eugene Newspaper Guild, Local 194 over wage scale change proposals.

(b) If the Union requests, cancel any wage-scale increases implemented through the Respondent's unilateral action.

(c) Post at its Eugene, Oregon facilities copies of the attached notice marked ''Appendix.''[8] Copies of the notice, on forms provided by the Regional Director for Region 19, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

[8] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT unilaterally and without consultation with the Eugene Newspaper Guild, Local 194, make wage-scale changes and announce them to employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, bargain with the Union over wage-scale change proposals.

WE WILL, if the Union requests, cancel any wage increases unlawfully granted to employees through our unilateral action.

GUARD PUBLISHING COMPANY D/B/A
THE REGISTER-GUARD